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## **DEPARTMENT OF HOMELAND SECURITY**

[Docket Number DHS–2013–0052]

Environmental Planning and Historic Preservation Program

**AGENCY:** Department of Homeland Security.

**ACTION:** Notice of Final National Environmental Policy Act Implementing Procedures.

**SUMMARY:** The purpose of this notice is to inform the public that the Department of Homeland Security (DHS or the Department) is issuing the final update to its policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.), as amended, and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508). The Department's NEPA procedures are contained in Directive 023-01, Rev. 01 and Instruction Manual 023-01-001-01, Rev. 01, Implementation of the National Environmental Policy Act (herein after referred to as Directive and Instruction). This notice also responds to the comments received on the Department's draft updated procedures published on June 5, 2014 (79 FR 32563).

**DATES:** The Directive and Instruction will be effective on [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** A. Marie Ecton, Senior Environmental Specialist, Department of Homeland Security, Telephone (202) 360-5661, or E-mail [a.marie.ecton@hq.dhs.gov](mailto:a.marie.ecton@hq.dhs.gov).

**SUPPLEMENTARY INFORMATION:**

Once effective, the Directive and Instruction will apply to all of DHS, which is currently comprised of over 20 support and operational components, and help ensure the integration of environmental stewardship into DHS decision making as required by NEPA. The Directive and Instruction will serve as the DHS implementing procedures for NEPA and the CEQ regulations (as required by 40 CFR 1505.1 and 1507.3) and therefore must be read in conjunction with the CEQ regulations.

The Directive and Instruction were substantially revised to address a number of circumstances and requirements that have arisen since April 19, 2006, the effective date of the original DHS NEPA procedures (Federal Register, Vol. 71, No. 64, April 4, 2006). For example, when originally published in 2006 the Directive and Instruction did not apply to the following three Components of DHS: Federal Emergency Management Agency (FEMA), Customs and Border Protection (CBP), and United States Coast Guard (USCG); these three Components each maintained their own procedures for implementing NEPA when the Department was established in 2002. This revision to the Directive and Instruction incorporates FEMA, CBP, and USCG into the Department's NEPA procedures and addresses the full scope of DHS activities to which NEPA applies. When the updated procedures become effective, they will apply to all Components of DHS, including FEMA, CBP, and USCG. In addition, every Component will have the option of developing Supplemental Instructions to establish how that particular Component will meet the requirements of the final version of the DHS Directive and Instruction. In a separate yet related effort, FEMA will pursue rescission of its regulations at 44 CFR 10 and replace them with Supplemental Instructions that conform to requirements of the DHS Directive and Instruction.

The requirements put forth in the revised Directive and Instruction emphasize that the NEPA process must be appropriately integrated into the performance of DHS missions and activities and decision making. The revised Directive establishes the overall policy that DHS will comply with NEPA, and the revised Instruction establishes the procedures for ensuring this compliance is implemented in an effective and efficient manner. The Instruction covers the following: overview of NEPA requirements, including requirements for the preparation and content of NEPA documents; management of NEPA implementation in DHS; criteria for Components to obtain a delegation of authority to approve their respective NEPA reviews; public involvement; dispute resolution; information protected from public disclosure; procedures for emergencies; review of applications from persons or organizations outside of DHS (e.g., grant applications); and an identification of the types of DHS activities normally reviewed in a CATEX, Environmental Assessment, or Environmental Impact Statement.

The CATEXs published in 2006 are being retained and are included in the Instruction (Appendix A, Table 1). In addition, the Instruction includes the following new CATEXs: one CATEX for an administrative activity; five CATEXs for real property management activities; 13 CATEXs for non-grant activities unique to FEMA's mission and authorities; and 19 CATEXs for federal assistance (e.g., grant) activities. For synopses of the administrative record support for the Department's list of 2006 and new CATEXs, see the docket and the DHS NEPA webpage at <http://www.dhs.gov/nepa>.

DHS invested over three years in developing the proposed revision to its NEPA procedures. The draft revised Directive and Instruction were provided to CEQ in the fall of 2013 for review and discussion prior to the June 5, 2014 publication for public

comment. DHS provided its proposed final revised Directive and Instruction to CEQ in early September 2014; CEQ responded with a letter dated November 10, 2014 prior to this publication of the final Directive and Instruction as required under 40 CFR 1507.3(a), indicating that the Department's revised procedures conform to NEPA and the CEQ regulations.

#### Comments on Categorical Exclusions and DHS Response:

DHS received a comment from the International Association of Fire Chiefs (IACF) regarding the proposed new CATEX for federally-assisted wildfire mitigation activities. To improve readability (but with no change to the scope), DHS revised the CATEX between the draft and final version to read as follows:

\*N11 Federal Assistance for Wildfire Hazard Mitigation Actions. Federal assistance for wildfire hazard mitigation actions involving the creation of defensible space or hazardous fuel reduction for up to 100 feet of at-risk structures which includes the selective removal of vegetation less than 12 inches in diameter through thinning, pruning, limbing, sawing, or brush cutting; removal of downed, dead, or dry vegetation material as part of the overall action.

The actions must be limited to less than 100 acres of vegetation removal either individually or when combined with other reasonably foreseeable private or public actions and follow appropriate best management practices.

Although IACF was supportive of the draft proposed CATEX, they recommended removal of the 100-foot limit on the creation of defensible space. DHS supports the mission and respects the perspective of IACF; however, for the time being DHS has

decided to retain the proposed wording of the CATEX. DHS relied on only a small number of FEMA Environmental Assessments (EAs) to support development of the new CATEX, and none of those EAs included a buffer greater than 100 feet. Without sufficient information from past DHS-funded wildfire mitigation projects that demonstrates that a larger buffer results in no potential for environmental impacts, DHS currently believes that a higher level of NEPA review and impact evaluation is necessary for actions involving more than 100 acres of vegetation removal.

If, as a result of additional DHS reviews of wildfire mitigation projects, DHS is able to document and determine that the buffer can reasonably be extended because there are few to no environmental impacts associated with larger scale clearing for wildfire mitigation purposes, then DHS will consider revising the CATEX. In addition, DHS will work with subject matter experts, including IACF, to obtain other data that may support future revisions to the CATEX.

Lastly, it is important to note that if proposed vegetation clearing for wildfire mitigation purposes is greater than 100 feet from a structure, DHS can still provide grant funding for the project once the appropriate level of environmental review has been conducted.

DHS received two comments from the State of Arizona Game and Fish Department (AZGFD) regarding the following proposed CATEX for federally-assisted new construction activities:

\*N8 Federal Assistance for New Construction Activities of Less Than One Acre in Undisturbed or Undeveloped Areas. Federal assistance for new construction and associated site preparation activities in undisturbed or undeveloped areas when the activities comprise less than one acre and follow best management practices to control noise, water, and air pollution. This category does not apply to new construction in undisturbed or undeveloped floodplains, wetlands, or seaward of the limit of moderate wave action (or V zone when the limit of moderate wave action has not been identified). This CATEX covers the range of activities typically necessary for new construction, including field work (e.g. borings, site inspection) and temporary staging and use of construction equipment and vehicles.

AZGFD's first comment was that the draft proposed CATEX as written "has the potential to impact wildlife resources in undisturbed/undeveloped areas without appropriate direct or cumulative impact analysis of construction activities. Construction activities within an acre of undisturbed or undeveloped areas have the potential to result in direct take of wildlife, habitat fragmentation, and reduced landscape wildlife permeability." AZGFD's second comment was a request that DHS include "clarifying language that ensures cumulative impacts for state trust wildlife resources are identified for all related actions, and that reasonable mitigation measures are implemented" and include "Best Management Practices (BMPs)...that reduce impacts to wildlife including timing restrictions, trenching guidelines, fencing guidelines, etc."

In response to AZGFD's comments on new CATEX N8, DHS added the following sentence to Section V.B(2) of the Instruction, which discusses how to appropriately apply

CATEXs to proposed actions: “Application of a CATEX to a proposed action presumes review and compliance under other relevant environmental planning and historic preservation laws, regulations, and Executive Orders (e.g., National Historic Preservation Act, Endangered Species Act) has occurred, and that a higher level of NEPA analysis is not warranted as a result of any identified impacts to resources protected under those other requirements.” In addition, DHS believes it has enough data from past actions to justify that no significant cumulative impacts result from the clearing of plots less than one acre each. If DHS were to provide federal assistance for the clearing of multiple one acre plots in close proximity to each other, this situation would constitute an extraordinary circumstance that would prohibit use of the CATEX and would require a higher level of NEPA analysis. The list of DHS extraordinary circumstances is provided in Section V.B(2)(c) of the Instruction; these include a consideration of impacts to protected species and habitat and environmentally sensitive areas, and a consideration of whether the proposed action is related to other actions with individually insignificant, but cumulatively significant impacts. As to cumulative impacts on habitat and species, these will get covered in the ESA consultation process; notwithstanding the new CATEX N8, DHS will consult with the U.S. Fish and Wildlife Service and relevant state agencies, such as AZGFD, for proposed actions potentially affecting protected species and habitat.

AZGFD also commented that the definition of Cooperating Agency included in Section II of the draft Instruction was not fully consistent with the CEQ definition in 40 CFR 1508.5. DHS agrees with AZGFD, and has revised the definition accordingly in the final Instruction.

DHS received questions regarding the need for CATEXs for Congressionally-mandated activities (existing USCG CATEXs L18 and L53, and new DHS-wide CATEX C6), to which NEPA does not apply. When Congress mandates an activity, such as the transfer of DHS controlled real property to a non-Federal entity, DHS has no discretion whether or not to perform the activity; however, DHS may have discretion on some aspects of how the activity is executed. Therefore, DHS NEPA practitioners expressed the need for such CATEXs where DHS has some level of discretion and the activities have been determined not to have the potential for significant environmental impacts.

Lastly, DHS received three comments regarding the accessibility and readability of the draft revised Directive and Instruction and supporting documents; namely that the Federal Register notice was inadequate as a means of communicating with stakeholders and the public, that hyperlinks to the documents should have been clearly identified and easily accessible, and that the documents were difficult to comprehend. The Federal Register and [www.regulations.gov](http://www.regulations.gov) are widely recognized as appropriate sources for the public to learn about and comment on Federal government initiatives. DHS wrote the documents according to style guides and writing standards applicable to the federal government as well as DHS-specific requirements of its formal Directives system. All relevant documents were and remain available to the public on the Department's NEPA webpage ([www.dhs.gov/nepa](http://www.dhs.gov/nepa)) and on the [www.regulations.gov](http://www.regulations.gov) website under Docket Number DHS-2013-0052. The June 5, 2014 Federal Register notice provided clear instructions to readers to visit these two websites to view the draft revised Directive and Instruction and supporting documents.



A copy of this Federal Register publication and the final Directive and Instruction and supporting documents are available on the internet at [www.regulations.gov](http://www.regulations.gov) (Docket Number DHS–2013–0052) and <http://www.dhs.gov/nepa>.

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